ROSLI SAAD v. SG CONCRETE PRODUCTS (M) SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
LIM CHONG FONG JCA
AHMAD FAIRUZ ZAINOL ABIDIN J
[CIVIL APPEAL NOS: P-04(W)-259-06-2023
& P-04(W)-260-06-2023]
6 NOVEMBER 2024

Abstract – *The determining factor on the applicability of either the Industrial Relations Act 1967 ('IRA'), as amended by the Industrial Relations (Amendment) Act 2020 ('Amendment Act'), or the unamended IRA, is the date when an aggrieved workman or person filed his representation for reinstatement, pursuant to s. 20 of the IRA, to the Director General of Industrial Relations. If such representation was filed prior to the date of enforcement of the Amendment Act, 1 January 2021, then the unamended IRA would be applicable.*

CIVIL PROCEDURE: *Judicial review – Challenge against decision of Industrial Court – Appeal against award of Industrial Court allowed by High Court – Whether matter ought to be brought by way of judicial review or appeal to High Court – Whether High Court erred in holding appeal was properly laid – Whether applicable Act was Industrial Relations Act 1967 ('IRA'), as amended by Industrial Relations (Amendment) Act 2020, or unamended IRA – Whether referral to Industrial Court, in respect to representation for reinstatement under s. 20 of IRA by aggrieved workman or person, ought to be made by Minister of Human Resources or Director General of Industrial Relations*

LABOUR LAW: *Award – Industrial Court – Appeal against award of Industrial Court allowed by High Court – Whether matter ought to be brought by way of judicial review or appeal to High Court – Whether High Court erred in holding appeal was properly laid – Whether applicable Act was Industrial Relations Act 1967 ('IRA'), as amended by Industrial Relations (Amendment) Act 2020, or unamended IRA – Whether referral to Industrial Court, in respect to representation for reinstatement under s. 20 of IRA by aggrieved workman or person, ought to be made by Minister of Human Resources or Director General of Industrial Relations*

The appellants were the employees of the respondent who were dismissed. Since 1996, the appellants were employed by the respondent as lorry drivers. The appellants were paid a basic monthly salary of RM300 and a trip allowance of RM30 per trip. The said rate continued until 2012. Around December 2012, the appellants protested to the respondent about their salary. Starting from January 2013, the respondent increased the appellants'

basic monthly salary to RM400, but the trip allowance remained the same. The said rate continued for the next six years, until the appellants, in January 2019, filed another protest to the respondent regarding their salary. Another increment was then given to the appellants' salary, the basic monthly salary was increased to RM500, while the trip allowance to RM33 per trip. Despite these increments, the salary paid was still below the minimum salary as prescribed under the Minimum Wages Order ('MGO') 2012 and 2018. Therefore, in 2020, the appellants filed a formal complaint to the Butterworth Labour Department that the respondent had flouted the said MGOs, including the MGOs for the years 2017 and 2020. As a result, after the respondent had taken a series of steps, the appellants were terminated from their employment on the grounds that the appellants had stayed away from their workplace for four consecutive days without reasonable excuse, breaching s. 15(2) of the Employment Act 1955. This prompted the appellants to file a representation to the Director General of Industrial Relations ('DGIR') pursuant to s. 20(1) of the Industrial Relations Act 1967 ('IRA') seeking for reinstatement. As the matter could not be resolved, the Minister of Human Resources ('Minister'), on 24 April 2021, referred the representation to the Industrial Court ('referral'). The Industrial Court, in allowing the appellants' representation, held that the appellants had not stayed away from their workplace without reasonable excuse and their dismissals by the respondent was without just cause. Dissatisfied, the respondent filed an appeal to the High Court. The appeal was allowed. Hence, the present appeals. In these appeals, the appellants raised a preliminary issue – whether the respondent, against the Industrial Court's award, ought to have filed for a judicial review instead of an appeal to the High Court. The issues that arose in the present appeals were: (i) whether the applicable Act in the present appeals were the IRA, as amended by the Industrial Relations (Amendment) Act 2020 ('Amendment Act'), or the unamended IRA; (ii) whether it was correct for the Minister to make the referral, and not the DGIR, to the Industrial Court; and (iii) whether the High Court erred in arriving at its decision.

Held (allowing appeals; reinstating award of Industrial Court)
Per Ahmad Fairuz Zainol Abidin JCA delivering the judgment of the court:

(1) It was undisputed that the appellants were terminated on 22 October 2020. Their representations pursuant to s. 20(1) of the IRA to the DGIR were filed within 60 days of their dismissal. This effectively meant that the representations were still made in 2020, a date when the Amendment Act had yet to come into force. Section 35 of the Amendment Act states that where any representation for reinstatement is made under s. 20 of the IRA before the coming into force of the Amendment Act, it shall proceed under the unamended IRA. In these appeals, considering that the representation for reinstatement was made before the coming into

force of the Amended Act, *ie*, 1 January 2021, by virtue of s. 35 of the Amendment Act, the unamended IRA was applicable in the present appeals. It was therefore for the Minister and not the DGIR to make the referral to the Industrial Court. (paras 19, 22, 24 & 26)

(2) The High Court Judge ('HCJ') made a factual error when he said the referral by the Minister to the Industrial Court was made on 22 October 2020. That was the date when the appellants were dismissed from their employment. The HCJ was also in error when he placed emphasis on the timing of the award by the Industrial Court. Section 35 of the Amendment Act does not cater for a situation where an award is made after the Amendment Act came into force. The HCJ had imported a provision which cannot be found in the Saving and Transitional provisions of the Amendment Act and made a ruling that any challenge of an award after 1 January 2021 must be by way of an appeal. As such, the HCJ erred when he ruled that the appeal was properly laid before the High Court. (paras 28-30 & 32)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Aneka Retail (M) Sdn Bhd v. Mahkamah Perusahaan Malaysia & Ors [2023] 2 CLJ 455 HC ***(refd)***

Hotel Equatorial (M) Sdn Bhd v. National Union Of Hotel, Bar & Restaurant Workers & Anor [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155 FC ***(refd)***

Sabah Banking Employees' Union v. Sabah Commercial Banks' Association [1989] 2 CLJ 135; [1989] 1 CLJ (Rep) 148 SC ***(refd)***

Legislation referred to:

Employment Act 1955, s. 15(2)
Industrial Relations Act 1967, ss. 20(1), (3), 33A, 33C
Industrial Relations (Amendment) Act 2020, s. 35

For the appellants - Ravi Nekoo; M/s Nekoo
For the respondent - Farah Irina Khairi Izwan; M/s Farah, Farhana & Company

[Editor's note: For the High Court judgment, please see S.G. Concrete Products (M) Sdn Bhd lwn. Rosli Saad [2023] CLJU 1694; [2023] 1 LNS 1694 (overruled).]

Reported by Syamim Ariffin

JUDGMENT

Ahmad Fairuz Zainol Abidin J:

Introduction

[1] This appeal emanates from the decision of the Penang High Court which allowed the company S.G. Concrete Products (M) Sdn Bhd's (referred to as "the respondent") appeal. In so doing, the High Court reversed the

finding of the Industrial Court and held that the dismissal of Rosli bin Saad and Rohlizan bin Abd Rahaman (collectively referred to as "the appellants") was made with just cause and excuse. Aggrieved by the findings of the High Court, the appellants appealed to this court.

[2] Before us, both appeals were heard together.

Background Facts

[3] The following facts, as narrated by the appellants are largely undisputed and lays the foundation that led to the appeal at the High Court:

(i) the appellants were both employed as lorry drivers for the respondent. They had joined the respondent in 1996. They were paid a basic monthly salary of RM300 and trip allowance of RM30 each trip;

(ii) they continued working for the next 16 years, *ie*, until 2012 with the same basic monthly salary stated in para. 3.1;

(iii) around December 2012, the appellants protested about their salary. Following this protest, in January 2013, the respondent increased their salary from RM300 to RM400 and the trip allowance remained at RM30 each trip. However, this increment was still below the Minimum Wages Order 2012 which prescribed the minimum salary to be RM900 per month;

(iv) the respondent continued paying the said salary of RM400 each month for the next six years, *ie*, until January 2019. In January 2019, the appellants again protested, and the respondent increased their salary from RM400 to RM500 with the trip allowance too receiving an increment from RM30 to RM33 each trip. However, this salary was still below the Minimum Wages Order 2018, which prescribed the minimum salary of RM1,100 per month;

(v) on 11 September 2020, the appellants filed a formal complaint with the Butterworth Labour Department that the respondent had flouted the Minimum Wages Order 2012, 2017, 2018 and 2020;

(vi) following this, the respondent had taken a series of steps and eventually terminated the appellants on the grounds that they had stayed away from workplace for four consecutive days without reasonable excuse and therefore were in breach of s. 15(2) of the Employment Act 1955;

(vii) the appellants had filed a representation to the Director General of Industrial Relations ('the DGIR') under s. 20(1) of the Industrial Relations Act 1967 ('the Act') seeking reinstatement;

(viii) the matter could not be resolved, and the Minister of Human Resources ('the Minister') had referred the matter to the Industrial Court;

(ix) upon hearing the parties, the Industrial Court disagreed with the respondent that the appellants had stayed away from workplace without reasonable excuse and held that the dismissal of the appellants was without just cause or excuse; and

(x) dissatisfied, the respondent filed a notice of appeal to the High Court.

The Preliminary Objection Raised By The Appellants At The High Court

[4] The appellants raised a preliminary objection on the issue of whether the respondent ought to have filed a judicial review instead of an appeal at the High Court. The High Court dismissed the preliminary objection.

The Preliminary Issue

[5] In his opening submissions before us, counsel for the appellants, Mr Ravi Nekoo informed the court that he wanted to raise a preliminary issue. It was the same objection he raised at the High Court.

[6] It was contended that the matter should have been brought by way of a judicial review instead of an appeal to the High Court. This was because the representation was referred to the Industrial Court by the Minister *vide* his referral dated 20 April 2021.

[7] Counsel relied on the decision of the High Court of Penang in *Aneka Retail (M) Sdn Bhd v. Mahkamah Perusahaan Malaysia & Ors* [2023] 2 CLJ 455; [2023] MLJU 26 where the High Court held that the test as to whether it should be an appeal or a judicial review depends on who referred the representation to the Industrial Court.

[8] In contrast, counsel for the respondent, Ms Farah Irina binti Khairi Izwan contended that the matter was rightly brought before the court *vide* an appeal as the law now provides for an avenue for appeal. Furthermore, she contended that the referral was in fact made by the DGIR thus fulfilling the requirements of the Act.

Our Findings On The Preliminary Issue

[9] It is important to trace the latest position of the law.

[10] The Industrial Relations (Amendment) Act 2020 (Act A1615) introduced several major changes to the Act. The amendments to the Act came into force on 1 January 2021. Suffice, for purposes of this appeal, only provisions relating to referrals of representations to the Industrial Court is focused on.

[11] The law as it stands, when dealing with representations by an aggrieved workman or person is found in s. 20. It reads as follows:

A Representations on dismissals

20. (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his
B former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

[12] Where the DGIR is satisfied that the representation cannot be settled by conciliation or any other steps that would resolve the complaint of the
C aggrieved person, the DGIR shall then take steps to refer the representation to the Industrial Court for determination. This is found in s. 20(3) where it reads:

(3) Where the Director General is satisfied that there is no likelihood of the representations being settled under subsection (2), the Director
D General shall refer the representations to the Court for an award.

[13] The power to refer the representation lies solely with the DGIR. The word "shall" connotes a mandatory requirement for the DGIR to refer the representation to the Industrial Court.

[14] This is in contrast to the unamended s. 20(3) where the Minister in
E exercising his discretion "may if he thinks fit" refer representations to the Industrial Court.

[15] The Act has now provided a clear appeal process after an award is made by the Industrial Court. This is seen with the introduction of s. 33C
F which reads as follows:

Appeal against an award to the High Court.

(1) If any person is dissatisfied with an award of the Court made under section 30 such person may appeal to the High Court within fourteen days from the date of receipt of the award.

G (2) The procedure in an appeal to the High Court shall be the procedure in the Rules of Court 2012 [P.U. (A) 205/2012] for an appeal from a Sessions Court with such modifications as the circumstances may require.

(3) In dealing with such appeals, the High Court shall have like powers as if the appeal is from the Sessions Court.

H **[16]** The appeal process is to the High Court and the procedure for such appeal would be that of an appeal from the Sessions Court to the High Court.

[17] The amendment has removed the limited right to appeal on questions of law under s. 33A of the unamended Act. Section 33A has now been
I deleted and replaced by s. 33C.

[18] Having set out the applicable law, it is critical for us to determine this matter based on the current set of facts before us. What is critical are the timelines that come into play.

[19] It is not disputed that the appellants were terminated on 22 October 2020. They then went on to file their representations pursuant to s. 20(1) of the Act to the DGIR within the 60 days of their dismissal. Although it was not clear from the records as to when exactly the representations were made, it is safe to presume that it was made within the statutory time frame of 60 days as stipulated in s. 20(1A) of the Act. This effectively meant that the representations were still made in 2020, a date when the amendments had yet to come into force ('representation date'). The Minister referred their representation to the Industrial Court on 24 April 2021 ('referral date').

[20] It can be seen that the time frame between the representation date and referral date straddles between two critical timelines where different provisions of law operate.

[21] This is where the drafters of the Act have in their wisdom introduced s. 35 of the Act A1615, to cater for the current conundrum. It reads as follows:

> Saving and transitional provisions
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> 35. (1) Complaints made under section 8, disputes referred under subsection 9(1A), claims for recognition made under section 9, *representations for reinstatement made under section 20 of the principal Act,* and all proceedings commenced or awards made before the Industrial Court in relation to a reference under subsection 8(2A), *subsection 20(3) and section 26 before the coming into operation of this Act shall proceed and have effect as if the principal Act had not been amended by this Act.*
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> (2) All rules and regulations, forms, directions and letter of authorizations made, issued or granted under the principal Act shall, to the extent that the rules and regulations, forms, directions and letter of authorizations are consistent with the principal Act as amended by this Act, continue to be in force until such rules and regulations, forms, directions and letter of authorizations are revoked or amended.
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> (3) Any investigation, trial or proceedings done, taken or commenced under the principal Act immediately before the coming into operation of this Act, shall be dealt with as if the principal Act had not been amended by this Act. (emphasis added)

[22] In essence, s. 35 of the Act A1615 states that where any representation for reinstatement is made under s. 20 of the Act before the coming into force of the amended Act, it shall proceed under the unamended Act.

[23] If the representation for reinstatement was made before 1 January 2021 and the Minister refers it before 1 January 2021, there is no ambiguity. Likewise, if the representation and referral were made after 1 January 2021.

[24] If the scenario is similar to the present case where the representation for reinstatement was made before 1 January 2021 and the representation to the Industrial Court was made after 1 January 2021, by application of s. 35 of the Act A1615, the unamended Act is to apply.

[25] The determining factor is when the said representation for reinstatement was made to the Department of Industrial Relations under s. 20 of the Act.

[26] Applying the facts to the above considerations, it is our view that it was proper for the Minister and not the DGIR to make the referral to the Industrial Court.

Reasoning Of The High Court

[27] The LHCJ reasoned as follows when he dismissed the preliminary objection:

> [1] Di hadapan Mahkamah ini peguam responden membangkitkan pihak Syarikat tidak boleh memfailkan rayuan sebaliknya perlu memfailkan semakan kehakiman atas keputusan Mahkamah Perusahaan. Kedua-dua kes ini dirujuk oleh Menteri kepada Mahkamah Perusahaan pada 22.10.2020. Pindaan kepada Akta Perhubungan Perusahaan berkuatkuasa mulai 1.1.2021 di mana tiada lagi rujukan oleh Menteri. Seksyen 33C memperuntukkan rayuan terhadap keputusan Mahkamah Perusahaan. Seksyen 35 Akta Pindaan 1615 memperuntukkan:
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> > … and all proceedings commenced or **awards** made before the Industrial Court in relation to a reference under subsection 8(2A), subsection 20(3) and section 26 **before the coming into operation of this Act** shall proceed and have effect as if the principal Act had not been amended by this Act.
>
> Walau bagaimanapun awad dibuat selepas tarikh pindaan ini maka oleh itu saya berpendapat pihak yang tidak berpuas hati dengan keputusan Mahkamah Perusahaan hendaklah memfailkan rayuan ke Mahkamah Tinggi dan bukannya semakan kehakiman. Oleh itu proses yang diambil oleh Syarikat adalah betul mengikut undang-undang.

[28] The LHCJ had made a factual error when he said the referral by the Minister to the Industrial Court was on 22 October 2020. That was the date on which the appellants were dismissed.

[29] It is our view that the LHCJ was also in error when he placed emphasis on the timing of the award. Section 35 of the Act A1615 does not cater for a situation where an award is made after the amended Act came into force.

[30] The LHCJ had therefore imported a provision that is not found in the saving and transitional provisions of Act A1615 and made a ruling that any challenge of an award after 1 January 2021 must be by way of an appeal.

[31] Instead, we emphasise again that the critical issue is the timing of the representation for reinstatement under s. 20(1). If the said representation was made before the coming into force of the amended Act, the proceedings should be based on the unamended Act.

[32] As such, we find that the LHCJ was in error when he ruled that the appeal was properly laid before the High Court.

[33] The apex courts have consistently held that the award of the Industrial Court, which is a public authority exercising quasi-judicial functions, cannot escape judicial interference and supervision of the High Court by way of judicial review.

[34] Authorities on this point are replete. (See *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865, *Sabah Banking Employees' Union v. Sabah Commercial Banks' Association* [1989] 2 CLJ 135; [1989] 1 CLJ (Rep) 148, *Hotel Equatorial (M) Sdn Bhd v. National Union Of Hotel, Bar & Restaurant Workers & Anor* [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155.)

[35] Therefore, by applying judicial precedent and the provisions of s. 35 of the Act A1615, any challenge against an award of an Industrial Court must be by way of a judicial review.

Findings On The Preliminary Issue

[36] It is our finding that the matter was erroneously brought before the High Court by way of an appeal. The LHCJ fell into error when he entertained the appeal and went on to set aside the Industrial Court award. On this basis alone, we find that the appeals ought to be allowed and the decision of the LHCJ is set aside. The award of the Industrial Court is reinstated.

[37] Given this finding, we do not find it necessary to consider the substantive appeal.

[38] The appeals are therefore allowed with costs of RM10,000 to be paid to appellants subject to allocatur.